MOTION FILED
NOV - 4 1997

(3)

No. 97-391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, et al.,
Petitioners,

vs.

TROY A. ASHMUS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

3188

QUESTIONS PRESENTED

The Court of Appeals in the present case affirmed an injunction issued by the District Court, which forbade the state Attorney General and other state officials from arguing, in actions brought against them in other courts, their position on an unsettled, debatable question regarding the interpretation of an Act of Congress. This raises the following questions:

1. Is the assertion in a court of law of such an argument a "violation of federal law" of the kind necessary to qualify for the *Ex parte Young* exception to Eleventh Amendment immunity?

2. Is the issuance of such an injunction a proper use of the equitable powers of the court, or is it an abuse of discretion?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, et al.,

Petitioners,

vs.

TROY A. ASHMUS, et al.,

Respondents.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The injunction issued in the present case is an unprecedented intrusion upon the Attorney General's ability to repre-

sent the people of the state in courts of law. Such interference is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reason, *amicus* requests leave to file its brief.

November, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Interest of *amicus curiae* iii

Table of authorities vii

Summary of facts and case 1

Summary of argument 3

Argument 4

I

Ex parte Young has been, and should remain, limited to injunctions against enforcement of unconstitutional statutes and violations of federal law, neither of which has occurred in this case 5

II

The injunction issued in this case was an unprecedented, improper use of judicial power 8

A. *NAACP* v. *Meese* 9

B. Interference with executive discretion 11

C. Interference with other cours 12

D. *Steffel* v. *Thompson* 13

III

Injunctive relief in the present case was neither necessary nor sufficient to resolve the underlying uncertainty 14

A. Unnecessary intrusion 14

B. An ineffective solution 18

Conclusion 20

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) 19

Ashmus v. Calderon, 935 F. Supp. 1048 (ND Cal. 1996) 2, 3, 13, 17

Baker v. General Motors Corp., 86 F. 3d 811 (CA8 1996) 9

Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623 (1876) 11

Booth v. Maryland, 112 F. 3d 139 (CA4 1997) 4, 9, 19

Buckley v. Valeo, 424 U. S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) 10

Caspari v. Bohlen, 510 U. S. 383, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994) 16

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 16

Cory v. White, 457 U. S. 5, 72 L. Ed. 2d 694, 102 S. Ct. 2325 (1982) 7

Death Row Prisoners of Pennsylvania v. Ridge, 106 F. 3d 35 (CA3 1997) 9

Deere v. Calderon, 890 F. Supp. 893 (CD Cal. 1995) 18

Doran v. Salem Inn, Inc., 422 U. S. 922, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975) 19

Edelman v. Jordan, 415 U. S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) 7

Ex parte Watkins, 3 Pet. (28 U. S.) 193, 7 L. Ed. 650 (1830) 4

Ex parte Watkins, 7 Pet. (32 U. S.) 568, 8 L. Ed. 786 (1833) 4

Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) 5, 6, 12

Firefighters Local Union No. 1784 v. Stotts, 467 U. S. 561, 81 L. Ed. 2d 483, 104 S. Ct. 2576 (1984) 9

Hawks v. Hamill, 288 U. S. 52, 77 L. Ed. 610, 53 S. Ct. 240 (1933) 12

Hill v. Butterworth, 941 F. Supp. 1129 (ND Fla. 1997) ... 9

Idaho v. Coeur d'Alene Tribe of Idaho, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) 5

In re Chetwood, 165 U. S. 443, 41 L. Ed. 2d 782, 17 S. Ct. 385 (1897) 3

In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P. 2d 729 (1993) 18

Lindh v. Murphy, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) 11

Marbury v. Madison, 1 Cranch (5 U. S.) 137, 2 L. Ed. 60 (1803) 4, 11

Morales v. Calderon, 85 F. 3d 1387 (CA9 1996) 18

NAACP v. Meese, 615 F. Supp. 200 (DC DC 1985) 9, 10, 11

Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U. S. 619, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986) 13

Papasan v. Allain, 478 U. S. 265, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986) 5

Pennhurst State School & Hospital v. Halderman, 465 U. S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) ... 5

People v. Ashmus, 54 Cal. 3d 932, 820 P. 2d 214 (1991) .. 2

People v. Gonzales, 20 Cal. 2d 165, 124 P. 2d 44 (1942) .. 9

Perez v. Ledesma, 401 U. S. 82, 27 L. Ed. 2d 701, 91 S. Ct. 674 (1971) 9

Plaut v. Spendthrift Farm, Inc., 514 U. S. 211, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995) 20

Rea v. United States, 350 U. S. 214, 100 L. Ed. 233, 76 S. Ct. 292 (1956) 9

Rizzo v. Goode, 423 U. S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976) 10, 12

Stefanelli v. Minard, 342 U. S. 117, 96 L. Ed. 138, 72 S. Ct. 118 (1951) 9

Steffel v. Thompson, 415 U. S. 452, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974) 13, 14

Stein v. New York, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077 (1953) 19

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976) 16

United States v. Dunnigan, 507 U. S. 87, 122 L. Ed. 2d 445, 113 S. Ct. 1111 (1993) 6

United States v. Mendoza, 464 U. S. 154, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984) 10

Williams v. Florida, 399 U. S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970) 6

Wilson v. Lambert, 168 U. S. 611, 42 L. Ed. 599, 18 S. Ct. 217 (1898) 12

Worcester County Trust Co. v. Riley, 302 U. S. 292, 82 L. Ed. 268, 58 S. Ct. 185 (1937) 6, 7

Younger v. Harris, 401 U. S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) 8, 12

Zwickler v. Koota, 389 U. S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967) 13

Rule of Court

Supreme Court Rule 10(a) 8

United States Constitution

U. S. Const., Art. II, § 3 10

United States Statutes

28 U. S. C. § 1292(b) 20

28 U. S. C. § 2201 19

28 U. S. C. § 2244(d) 14, 16, 18

28 U. S. C. § 2254(a) 8

28 U. S. C. § 2261(d) 16

28 U. S. C. § 2262(b) 19

28 U. S. C. § 2262(c) 19

28 U. S. C. § 2263 ..... 15, 16, 19

28 U. S. C. § 2265 17

28 U. S. C. § 2266 18

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 3

State Constitution

Cal. Const., Art. V, § 1 10

Cal. Const., Art. V, § 13 10

Treatise

16B C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure (2d ed. 1996) 19

Miscellaneous

California Supreme Court Policies Regarding Cases Arising from Judgments of Death 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, et al.,

Petitioners,

vs.

TROY A. ASHMUS, et al.,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

The present case began over 13 years ago.[1]

"Most of the basic facts [of Ashmus' crime] were essentially undisputed at trial.

"About 4 o'clock on the afternoon of Saturday, May 19, 1984, Marcella (Marcie) D., who was seven years of age, rode to Howe Park in Sacramento on her bicycle. There she met her brother Arby, age 10, who was responsible for her, and Arby's friend Ernesto (P.J.) G., age 9. Arby and P.J. walked to a pond to fish from a dock, and Marcie went to play with some children within a few feet of the boys.

"Defendant, who was 22 years old, approached Arby and P.J. as they were fishing. For the past few days he had been

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

camping in an area in adjacent Santa Anita Park called Stoner's Pit, a site that was filled with litter but also secluded and covered with vegetation. He gave the boys advice and help in their fishing, and stayed nearby.

"About 5 or 5:30 p.m., Arby and P.J. walked to the park clubhouse. Marcie soon rode up. She said that she was going off to Santa Anita Park with defendant: he had told her that he knew of a duck's nest there, and that he would give her a duckling if any had hatched. The boys said that she should return in about an hour.

"Defendant and Marcie proceeded to Stoner's Pit. Once there, he subjected her to a fatal attack. He raped her and perhaps also penetrated her with some foreign object, making a very large tear through the length of her vagina to within a quarter of an inch of her rectum. He sodomized her, inflicting two small wounds in the anal or rectal tissue. He possibly committed oral copulation by inserting his penis into her mouth. He evidently ejaculated over her body. He stuffed into her mouth and throat material including two plastic bags, a piece of cellophane about six inches long and two to three inches wide, and a pair of red shorts she had been wearing; the bags were wedged side-by-side in separate tight wads deep in her throat with the cellophane in between; the shorts were tightly compressed within her mouth; the bags obstructed her throat and caused her to die by asphyxiation. Covering her naked body with a carpet remnant he had used for a sleeping mat during his stay at Stoner's Pit, he fled the scene." *People* v. *Ashmus*, 54 Cal. 3d 932, 952-953, 820 P. 2d 214, 222 (1991).

The jury found Ashmus guilty of rape, sodomy, lewd acts on a child, and murder. It found true the "special circumstances" that the murder was committed in the course of the three sex crimes, making Ashmus eligible for capital punishment, and in the penalty phase the jury returned a verdict of death. *Id.*, at 952, 820 P. 2d, at 222. The California Supreme Court affirmed in a thorough, unanimous opinion by Justice Mosk, spanning 81 pages in the official reports. *Id.* That was almost six years ago.

Ashmus filed an application for counsel and stay in federal court on February 17, 1993. See *Ashmus* v. *Calderon*, 935

F. Supp. 1048, 1054, App. to Pet. for Cert. 26a-27a (ND Cal. 1996). The case has been in federal district court for over four years now.

On April 24, 1996, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Sections 101 through 106 of that Act contain a number of reforms of general habeas law. Section 107 added Chapter 154 to U. S. Code Title 28, containing additional reforms contingent upon the state adopting qualifying measures regarding appointment of counsel.

The Attorney General of California, a defendant in the present case, has taken the position that California qualifies for Chapter 154. Rather than litigate this question in his habeas proceeding, Ashmus filed the present civil action, seeking declaratory and injunctive relief. He filed that action April 24, the same day the President signed the Act.

The District Court granted declaratory relief that Chapter 154 does not apply to California. 935 F. Supp., at 1075, App. to Pet. for Cert. 76a. Further, the court granted injunctive relief:

> "[D]efendants . . . ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28, United States Code, in any state or federal proceeding involving any class members." *Id.*, at 1076, App. to Pet. for Cert. 78a-79a.[2]

The Court of Appeals affirmed, modifying the injunction only slightly to allow state officials to argue that future changes may qualify for Chapter 154. App. to Pet. for Cert. 21a.

SUMMARY OF ARGUMENT

The Eleventh Amendment precludes this suit, because an essential element of the *Ex parte Young* exception is missing.

---

2. Interpreted literally, this injunction would even forbid the present certiorari petition. Such an order would be void. See *In re Chetwood*, 165 U. S. 443, 461 (1897).

Defendants do not seek to enforce any unconstitutional statute, and they have neither committed nor threatened any violation of federal law. The mere assertion in a court of law of a good-faith argument is not a "violation," within the meaning of *Young*, regardless of its effect on the plaintiff.

Even if the District Court did have jurisdiction, the issuance of an injunction in this case was an improper exercise of equitable power. To enjoin the Attorney General from asserting a good-faith argument in other cases before other courts, which have been filed *against* state officials, not by them, is a massive and unprecedented intrusion upon the discretionary responsibilities of an executive officer. Further, the preliminary injunction was neither necessary nor effective to resolve the uncertainty in the law. Only a final judgment can do that.

ARGUMENT

The District Court in the present case issued an injunction of breathtaking audacity. That order forbids officers of the state from asserting a good-faith position on an important unsettled question of law in other cases in other courts before other judges. These other cases, furthermore, were not commenced *by* these officers, but rather have been or will be brought *against* these officers, as respondents, by the members of the plaintiff class.

Petitioners assert that the Eleventh Amendment precludes this suit altogether. The argument on this point is ably presented in the petition, in the Fourth Circuit's opinion in *Booth* v. *Maryland*, 112 F. 3d 139 (1997), and in Maryland's Brief in Opposition in that case, No. 97-5623. *Amicus* will add only a brief argument in part I. Yet even if the suit were not jurisdictionally precluded, the question would remain whether this was a proper use of the injunctive power. The existence of the power and the propriety of its use are separate questions. Compare *Marbury* v. *Madison*, 1 Cranch 137, 173, 176 (1803) (original mandamus would be proper remedy, but Supreme Court had no jurisdiction to issue it) with *Ex parte Watkins*, 3 Pet. 193, 208-209 (1830) and *Ex parte Watkins*, 7 Pet. 568, 572-574 (1833) (Supreme Court had jurisdiction to issue original habeas, but writ did not lie to attack final judgment). That argument is presented in parts II and III.

I. *Ex parte Young* has been, and should remain, limited to injunctions against enforcement of unconstitutional statutes and violations of federal law, neither of which has occurred in this case.

Under the Eleventh Amendment, a private party's suit in federal court "against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State School & Hosp.* v. *Halderman*, 465 U. S. 89, 102 (1984). On its face, this principle would appear to preclude all suits against state officers acting in their official capacities, since "the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 138 L. Ed. 2d 438, 448, 117 S. Ct. 2028, 2034 (1997).

The rule of *Ex parte Young*, 209 U. S. 123 (1908), permitting such suits, is an exception. *Coeur d'Alene*, at 447, 117 S. Ct., at 2034. That exception "rests on a fictional distinction between the official and the State." *Id.*, at 448, 117 S. Ct., at 2034. That fiction does not extend to every prospective relief case. *Ibid.* It must be applied judiciously to "ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent *violations* of federal law." *Ibid.* (emphasis added).

"In accordance with its original rationale, *Young* applies only where the underlying authorization upon which the named official acts is asserted to be *illegal*." *Papasan* v. *Allain*, 478 U. S. 265, 277 (1986) (emphasis added). Even in *Coeur d'Alene*, where this Court was deeply divided on other aspects of the Eleventh Amendment, there was unanimity on this point. An essential element of the *Young* exception is a violation of federal law. See 138 L. Ed. 2d, at 455, 117 S. Ct., at 2040 (majority) ("on-going violation of federal law"); *id.*, at 463-464, 117 S. Ct., at 2046 (O'Connor, J., concurring in part and concurring in the judgment) (same); *id.*, at 467, 117 S. Ct., at 2048 (Souter, J., dissenting) ("The plaintiff must allege that the officers are acting in violation of federal law . . .").

The action proposed by the Attorney General which led to the present case was to assert in a court of law a plausible, good-faith

argument regarding the interpretation of an Act of Congress. Plaintiff contends, and the lower courts held, that this assertion would have the practical effect of forcing them to forego certain federal rights.[3] But impact on the plaintiff is not the test. A legal act is a legal act, and not a violation, even if it does have the effect claimed. For example, a prosecutor who puts on a compelling case of guilt may, as a practical matter, force a defendant to give up his Fifth Amendment right and take the stand, but that effect does not transform skilled advocacy into a constitutional violation. See *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970). "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993).

Young found the requisite violation in a stated intent to commence prosecutions under an unconstitutional statute, even though the constitutionality has not been previously determined. See *Young*, *supra*, 209 U. S., at 160. That is something of a stretch, but by this point it is well established in precedent. The present question is whether that stretch should be further stretched to cover a contention made in court where there is no question of an unconstitutional statute or other illegality of the official's action. The answer to that question is also well established in precedent. The answer is no.

Worcester County Trust Co. v. *Riley*, 302 U. S. 292 (1937) involved the taxes on the estate of a decedent whose state of domicile was disputed. Massachusetts and California both claimed him and the right to tax the intangibles of his estate. *Id.*, at 294. Plaintiff, the administrator, filed an interpleader, *ibid.*, claiming that the effect of the state officials' actions threatened to deprive the estate of its federal right against double taxation. *Id.*, at 297-298.

The Court unanimously held the action barred by the Eleventh Amendment, distinguishing *Young*. First, the state officials were

---

3. Actually, it is not the Attorney General's assertion but *the possibility he may be right* that has this effect. If the Attorney General's position were patently wrong, and certain to be rejected by the courts, its assertion would be of little or no concern to plaintiffs.

simply and properly seeking a judicial determination of whether their position was correct, an act well within their official duties. *Id.*, at 298-299. Second, unlike *Young* and its progeny, "the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it." *Id.*, at 300.

These principles apply with full force to the present case. The Attorney General seeks to enforce the single most important law the state has: the law which defines and punishes murder. To this end, he must defend against habeas corpus actions which seek to overturn valid judgments. The defense of such cases and the choice of arguments to present falls squarely within his constitutional responsibilities. There is no basis for asserting that he lacks authority for his actions or seeks to enforce an unconstitutional statute.

Worcester County remains good law today. *Cory* v. *White*, 457 U. S. 85, 86 (1982) involved a similar dispute regarding the estate of Howard Hughes. The Court of Appeals thought "that *Edelman* v. *Jordan*, 415 U. S. 651 (1974) had silently, but effectively, overruled *Worcester*," *id.*, at 88. *Edelman* did no such thing. *Id.*, at 90.

> "Neither did *Edelman* deal with a suit naming a state officer as defendant, but *not alleging a violation of either federal or state law*. Thus, there was no occasion in the opinion to cite or discuss the unanimous opinion in *Worcester* that the Eleventh Amendment bars suits against state officers unless they are alleged to be acting contrary to federal law or against the authority of state law. *Edelman* did not hold that suits against state officers who are not alleged to be acting against federal or state law are permissible under the Eleventh Amendment if only prospective relief is sought. Whether or not that would be the preferable rule, *Edelman* v. *Jordan* did not adopt it.
>
> "Furthermore, if that were to be the law, *Worcester* must in major part be overruled. We are unwilling, however, to overrule that decision and narrow the scope of the Eleventh Amendment to the extent that action would entail." *Id.*, at 91 (emphasis added).

For the Attorney General of California to argue to a federal court that California qualifies for Chapter 154 of Title 28, United States Code is not, by any stretch of the imagination, a violation of any law, state or federal. The *Ex parte Young* exception is inapplicable. The Eleventh Amendment bars this action against state officials acting in their official capacity.

In a habeas corpus action, the habeas petitioner does allege a violation of federal law. He alleges that he is being held in custody in violation of the Constitution, laws, or treaties of the United States. The federal habeas court cannot grant relief on any other basis. 28 U. S. C. § 2254(a). Hence, habeas cases always qualify for the *Ex parte Young* exception.

The underlying question need only be resolved in one such case. If the habeas petitioner prevails and California is held not to qualify, the final judgment in that case would settle the question, as much as it can be settled, by *stare decisis*. See part III B, *infra*, at 14-20. There is, therefore, no need to further stretch the already strained fiction of *Ex parte Young*.

II. The injunction issued in this case was an unprecedented, improper use of judicial power.

Review on writ of certiorari is appropriate when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . . ." Supreme Court Rule 10(a). For the reasons that follow, *amicus* CJLF submits that the injunction issued by the District Court, and its affirmance by the Court of Appeals, are prime examples of such departure.

There is a large body of case law dealing with requests for injunctions forbidding an official from commencing or prosecuting a suit in another court on the ground that the statute or ordinance sought to be enforced is unconstitutional. See, *e.g.*, *Younger* v. *Harris*, 401 U. S. 37, 39 (1971). A smaller body of case law deals with requests for injunctions to prevent a party or witness from presenting evidence wrongfully obtained in another court. These cases generally hold such injunctions to be improper.

See, *e.g.*, *Perez* v. *Ledesma*, 401 U. S. 82, 84-85 (1971); *Stefanelli* v. *Minard*, 342 U. S. 117, 122-123 (1951); *People* v. *Gonzales*, 20 Cal. 2d 165, 171, 124 P. 2d 44, 47 (1942) (Traynor, J.); but see *Rea* v. *United States*, 350 U. S. 214, 217 (1956); see also *Baker* v. *General Motors Corp.*, 86 F. 3d 811, 818-820 (CA8 1996), cert. granted No. 96-653 (argued Oct. 15, 1997).

The present case is a large step further removed. The state officials have done nothing wrong. They are respondents in actions commenced against them and have an honest, good-faith argument to make on an unsettled question of law. Yet they are forbidden to make it. Except for the other AEDPA cases, there appears to be no precedent for such an injunction in American law.[4]

A. NAACP v. Meese.

The closest case *amicus* has found is *NAACP* v. *Meese*, 615 F. Supp. 200 (DC DC 1985). That case arose in the aftermath of *Firefighters Local Union No. 1784* v. *Stotts*, 467 U. S. 561 (1984), a case involving racially-based layoffs by a fire department under a consent decree. Attorney General Meese had "a far different and broader interpretation" of *Stotts* than the NAACP, *Meese*, 615 F. Supp., at 201, so that organization sought an order

> "enjoining the Attorney General and his subordinates from reopening, causing to be reopened, or consenting to the reopening of any decree in an action brought by the government under Title VII of the Civil Rights Act of 1964, as amended, on the basis that such decree contains goals, timetables, numerical remedies, or other relief for persons not

---

4. Three other District Courts have issued such injunctions on the same point. One has been reversed outright. *Booth* v. *Maryland*, 112 F. 3d 139, 146 (CA4 1997) (Eleventh Amendment). One case has been resolved without addressing the injunction, *Death Row Prisoners of Pennsylvania* v. *Ridge*, 106 F. 3d 35, 36 (CA3 1997) (noting Eleventh Amendment problem; Commonwealth's statement that Pennsylvania does not qualify is sufficient for underlying action to be "resolved and terminated"), thus implying that the injunction was unnecessary. The third is still pending. *Hill* v. *Butterworth*, 941 F. Supp. 1129 (ND Fla. 1996), appeal pending.

proven to be 'actual victims' of discrimination . . . ." *Ibid.* (footnotes omitted).

The wisdom, restraint, and discretion exercised by Judge Greene in *NAACP* v. *Meese* stands in sharp contrast to the attitude displayed by the District Court and the Court of Appeals majority in the present case.

> "[T]wo fundamental principles of law so clearly stand as obstacles to the grant of relief by the Court that none of the other issues is open for consideration. Plaintiff's action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States." *Id.*, at 202.

On the first point, Judge Greene noted that any attempt by the judiciary to dictate what positions the executive could present to the courts would be an interference with a duty expressly assigned by the Constitution to the executive branch, to "take Care that the Laws be faithfully executed." *Ibid.* (quoting U. S. Const., Art. II, § 3; *United States* v. *Mendoza*, 464 U. S. 154, 161 (1984); *Buckley* v. *Valeo*, 424 U. S. 1, 138 (1976)).

Defendants in the present case have substantially the same constitutional duty. Cal. Const., Art. V, §§ 1, 13. The structural concerns are even greater in the present case, because the interference breaches both the judicial/executive boundary and the federal/state boundary. See *Rizzo* v. *Goode*, 423 U. S. 362, 378-379 (1976).

The second reason for denying injunctive relief in *NAACP* v. *Meese* was that "[a]ny such order would, of course, directly affect the course of the litigation in [other] courts, and it would, indeed, interfere directly with their jurisdiction over the lawsuits." 615 F. Supp., at 204. Principles of comity and the availability of relief in the other court required denial of the requested injunction. *Id.*, at 205.

> "One of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien. To close that door to the Attorney General by prohibiting him from filing in any federal court of

> the land pleadings expressive of the position of the Executive Branch with respect to Title VII lawsuits in which that Branch has a legal interest would be an extraordinary step indeed.
>
> "Not only is there no precedent in any of the decided cases for such an invasion by a district court into the Executive's prosecutorial discretion—or for the resulting interference with the authority of other federal courts to deal with litigation pending before them as they see fit—but basic jurisprudential principles affirmatively prohibit such an action. It may well be that plaintiffs are correct in their interpretation of *Stotts*, but the Supreme Court's opinion in that case is sufficiently Delphic that a contrary construction cannot with certainty be ruled out." *Id.*, at 205-206 (footnotes omitted).

The statute at issue in the present case could also be described as "Delphic," or in even less charitable terms. See *Lindh* v. *Murphy*, 138 L. Ed. 2d 481, 494, 117 S. Ct. 2059, 2068 (1997). The terms for states to qualify for Chapter 154 are well within the bounds of reasonable disagreement among lawyers and judges. The fact that Congress took care to include an express retroactivity clause in Chapter 154, see *id.*, at 488-489, 117 S. Ct., at 2063, indicates that Congress thought some states would qualify based on existing systems, and if California does not it is difficult to see that any state does.

Although no opinion of this Court comes as close to the present case as *NAACP* v. *Meese*, *supra*, the elements of that decision can be found in numerous cases. These cases establish that a court of equity should generally refrain from interfering with either the discretionary acts of the executive or with the progress of a case properly before another court.

B. Interference with Executive Discretion.

The reluctance of courts of equity to interfere with discretionary acts of the executive goes back to the earliest cases. In *Marbury* v. *Madison*, 1 Cranch 137, 170-171 (1803), Chief Justice Marshall noted that the writ of mandamus would not lie if the act sought was discretionary with the executive officer. In this sense, mandamus and injunction are "somewhat correlative," *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 (1876), and the same rule applies.

> "Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue 'unless in a case reasonably free from doubt.' *Massachusetts State Grange* v. *Benton*, 272 U. S. 525, 527. The rule has been characterized as an 'important' one, to be 'very strictly observed.' 272 U. S., at 527, 529." *Hawks* v. *Hamill*, 288 U. S. 52, 60 (1933).

Indeed, even *Ex parte Young*, 209 U. S. 123 (1908) reiterated the long-standing rule on the impropriety of restraining discretionary executive acts. *Id.*, at 158-159. To justify an injunction in the case before it, *Young* held that there is no discretion to enforce a statute which is unconstitutional and void. *Ibid.* The present case, by contrast, involves a statute which is clearly constitutional, and the only issue is its interpretation. The decision as to which good-faith arguments to present to courts of law goes to the very core of the discretionary responsibility of the state's chief attorney.

Even within a unitary system, courts should avoid interference with a decision vested in the executive branch. *Rizzo* v. *Goode*, 423 U. S. 362, 378-379 (1976). When the interference crosses the federal/state line, this principle applies with even greater force. *Id.*, at 379. This principle was ignored in the present case.

C. Interference with Other Courts.

Most of the cases on interference with other courts deal with federal injunctions against state court proceedings. This is probably the result of the relative frequency of the requests for such relief. Few litigants are motivated to ask one federal court to enjoin proceedings in another. Even so, the *Younger* v. *Harris*, 401 U. S. 37 (1971) line of cases sheds light on the present problem, because that doctrine is based on general principles of equity as well as federalism.

The general rule of equity is an old one. "There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding." *Wilson*

v. *Lambert*, 168 U. S. 611, 618 (1898). The *Younger* line is based on this principle, as well as on federal/state comity. *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619, 627 (1986). It is not limited to criminal proceedings. *Ibid.*

The District Court in the present case acknowledged that its "decision may constrain the ability of other co-equal district court judges to decide the issue differently." *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1068, App. to Pet. for Cert. 59a-60a (ND Cal. 1997). Yet it considered this question only under the discussion of declaratory relief and class certification and did not reconsider it when discussing the vastly greater intrusion of injunction. Cf. *id.*, at 1075-1076, App. to Pet. for Cert. 77a-78a. That is where the true interference lies, and that is where centuries-old principles of equity caution restraint. Instead of correcting this error, the Court of Appeals brushed off the declaratory relief/injunction distinction in two sentences. App. to Pet. for Cert. 20a.

D. Steffel v. Thompson.

In deciding that the plaintiffs had stated a cause of action, the District Court relied heavily on *Steffel* v. *Thompson*, 415 U. S. 452 (1974). *Ashmus*, 935 F. Supp., at 1062-1063, App. to Pet. for Cert. 44a-48a. On the question of whether an injunction is proper, however, *Steffel* points in exactly the opposite direction. The essence of that case is that declaratory relief, and not injunction, is the preferred way to resolve these kinds of uncertainties in the law.

Tracing the history of the Declaratory Judgment Act, *Steffel* found that "Congress plainly intended declaratory relief to act as an *alternative* to the strong medicine of the injunction . . . ." 415 U. S., at 466 (emphasis added). *Steffel* also relied on the earlier decision in *Zwickler* v. *Koota*, 389 U. S. 241, 254 (1967), which held that it was "error" to consider the two forms of relief "as a single question." *Steffel*, 415 U. S., at 468. Such an approach "would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate." *Id.*, at 471.

The present case is the converse of *Steffel*. Both courts below found that declaratory relief was appropriate and then blithely tagged on an unprecedented, massively intrusive injunction without pausing to consider the weighty prudential consider-

ations that ought to go into such a decision. Under *Steffel*, this is error.

III. Injunctive relief in the present case was neither necessary nor sufficient to resolve the underlying uncertainty.

The principal requirement for a preliminary injunction, as distinct from other forms of relief, is a showing of irreparable injury. See *Steffel* v. *Thompson*, 415 U. S. 452, 471-472 (1974). Naturally, the injury must be one that the injunction is capable of preventing, or else there would be no point in issuing it. An injunction should only issue, then, when it is both necessary and effective. In the present case it is neither.

A. Unnecessary Intrusion.

In part II, we described how this injunction is a massive intrusion on the constitutional responsibilities of state officers. In this part, we will explain why it was unnecessary.

The Antiterrorism and Effective Death Penalty Act contains two limitations on the filing of habeas corpus petitions. New subdivision (d) of 28 U. S. C. § 2244 provides:

> "(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> "(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> "(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> "(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> "(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

For states qualifying for chapter 154, new section 2263 provides this limitation:

> "(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> "(b) The time requirements established by subsection (a) shall be tolled—
>
> "(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> "(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
>
> "(3) during an additional period not to exceed 30 days, if—
>
> "(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

> "(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

In addition to the length, six months versus a year, the limitations differ in their treatment of the time to petition for certiorari. In section 2263(a), the clock starts on final affirmance in state court, but then is tolled under subdivision (b)(1) when the certiorari petition is actually filed. A petitioner who used his full 90 days to prepare the certiorari petition would have used half of his 180 days. Of course, since certiorari is not part of the exhaustion requirement, *Stone* v. *Powell*, 428 U. S. 465, 495, n. 38 (1976), there is no reason the certiorari and habeas petitions cannot be prepared at the same time.

Section 2244(d)(1)(A) starts the clock at the conclusion of "direct review" without specifying the state court decision. This omission, plus the reference to the judgment becoming final, appears to be an adoption of the rule for *Teague* finality, *i.e.*, denial of certiorari by this Court or the expiration of time to seek it. Cf. *Caspari* v. *Bohlen*, 510 U. S. 383, 390-391 (1994). Thus, the noncapital petitioner, or the capital petitioner in a nonqualifying state, could have up to nine months longer to file his petition.[5]

Congress had a good reason for creating different rules. Habeas petitioners have no constitutional right to counsel in state habeas, not even in capital cases. *Coleman* v. *Thompson*, 501 U. S. 722, 756-757 (1991). Chapter 154 only applies to inmates who have been provided counsel on state habeas. The fact that the petitioner has already had one attorney-prepared habeas petition makes an enormous difference in preparing the second.

In a traditional post-conviction review system, where habeas follows direct appeal and where a different attorney must be appointed for that procedure, see 28 U. S. C. § 2261(d), an unrepresented inmate's time under section 2263 could conceivably be running while he awaited appointment of state habeas counsel.

---

5. The difference will be smaller if a state habeas petition is pending during all or part of the gap between the decision on direct appeal and the filing of the certiorari petition. See 28 U. S. C. § 2263(b)(2) (tolling during pendency of state habeas).

That possibility need not concern the Court in this case, however, as California seeks only to qualify under "unitary review."

As the District Court recognized, a system of "unitary review" does not necessarily mean a single consolidated proceeding. Under California's present system, state habeas is conducted during the pendency of the direct appeal, and this is sufficient to constitute "unitary review" within the meaning of 28 U. S. C. § 2265. *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1070, App. to Pet. for Cert. 65a (ND Cal. 1997). The attorney appointed to represent the defendant on direct appeal is also responsible for the habeas petition, and it is due 90 days after completion of the appellate briefing. See California Supreme Court Policies Regarding Cases Arising from Judgments of Death, App. to Pet. for Cert. 94a.

Under this system, then, *every* death row inmate has an attorney appointed to represent him on state habeas before the clock ever begins to run under 28 U. S. C. § 2263. If the attorney files the petition within the required time, again before the clock begins, the clock will not start until the California Supreme Court has decided that petition.

The injury cited by the Court of Appeals is the possibility of an unrepresented petitioner being forced to file a "bare bones" petition in order to meet the limitation period of section 2263.[6] App. to Pet. for Cert. 10a. This statement overlooks the fact that federal habeas for California capital prisoners reviews *fully completed litigation*. Before the clock ever starts, petitioner has already had state habeas and appellate counsel appointed. He has already had an opportunity to present every cognizable claim to a competent court. He has already had a decision on them. The claims are set forth in the state pleadings and need only be recast into the form of a federal petition. Six months is more than enough time for the federal court to appoint counsel and for that counsel to file a meaty petition, not a "bare bones" one.

---

6. This statement appears in the Eleventh Amendment analysis. The court's two-sentence discussion of propriety of injunctive relief makes no mention of the irreparable injury requirement. See App. to Pet. for Cert. 14a.

If, for any reason, counsel could not be appointed within six months, reasonable accommodation for an indigent, unrepresented petitioner would seem to allow him to simply attach the state pleadings and assert all federal claims in them. Claims omitted from the appeal and first state habeas are generally procedurally barred. See *In re Clark*, 5 Cal. 4th 750, 765, 770, 855 P. 2d 729, 738 (1993); *Deere* v. *Calderon*, 890 F. Supp. 893, 895 (CD Cal. 1995) (*Clark* rule is enforceable bar).[7] The few additional claims, if any, that would be cognizable on federal habeas can be added by amendment to the petition.

The Court of Appeals noted that 28 U. S. C. § 2266(b)(3)(B) in Chapter 154 limits amendments to the petition, and that a District Court which holds that California qualifies for Chapter 154 might not allow amendment. App. to Pet. for Cert. 16a. Such a decision, if erroneous, is not irreparable. If the ultimate decision is that California does not qualify, a holding under Chapter 154 would be reversed. If the ultimate resolution is that California does qualify, the petitioner has not lost anything to which he was entitled.

Thus, even if the Attorney General's so-called "threats" were the source of uncertainty, the danger of irremediable injury flowing from that uncertainty is exaggerated in the opinions below. The massive, unprecedented intrusion of the injunction issued in this case was unnecessary and hence improper.

B. An Ineffective Solution.

The uncertainty in this case does not spring from any assertions by the state officials. The uncertainty comes from the law itself. The preliminary injunction issued in this case, therefore, does nothing to resolve the underlying question.

If the state qualifies for Chapter 154 of Title 28, then the habeas petition must be filed within 180 days, unless the criteria

---

7. There is contrary (and, *amicus* believes, wrongly decided) Ninth Circuit authority for pre-*Clark* cases. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1393 (1996), cert. denied 136 L. Ed. 2d 391, 117 S. Ct. 500 (1996). Most, if not all, such cases have since met or defaulted the one-year limitation of 28 U. S. C. § 2244(d). There is clearly no need for injunctive relief in such cases, since the "gap" period where section 2263 makes a difference is already past.

for successive petitions are met. 28 U. S. C. §§ 2263, 2262(b)(1), 2262(c). This rule is undeniably mandatory. By declaring that "no Federal court thereafter shall have the *authority* to enter a stay of execution," *id.*, at § 2262(c) (emphasis added), Congress has made clear that these limits are jurisdictional.

A preliminary injunction, even when affirmed on appeal, is not res judicata. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4009, p. 157 (2d ed. 1996). Even a "permanent" injunction can be lifted if the precedent on which it is based "is no longer good law." *Agostini* v. *Felton*, 138 L. Ed. 2d 391, 410, 117 S. Ct. 1997, 2016 (1997). Notwithstanding the injunction issued in this case, then, if this Court or the Ninth Circuit en banc should later decide that California does qualify for Chapter 154, all pending petitions filed out of time would have to be dismissed, unless they qualify for an exception.

Petitioners in such cases might argue that the state had defaulted the limitation defense by not raising it in the answers to their respective petitions. A more egregious denial of due process of law could scarcely be imagined than to enjoin a party from asserting a valid defense and then declare him in default for obeying the injunction. The people, as well as the defendant, are entitled to due process of law. *Stein* v. *New York*, 346 U. S. 156, 197 (1953), overruled on other grounds in *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964).

If California does, in reality, qualify, then it has a right granted by Congress to have the issues joined within 180 days. For a court to strip the state of its Congressionally conferred rights through a forced default would raise grave questions of separation of powers. The state must be permitted to assert its valid defense at the first opportunity.

The uncertainty can only be resolved by a final judgment. If the Fourth Circuit is right, the issue must be resolved within a habeas proceeding. *Booth* v. *Maryland*, 112 F. 3d 139, 145-146 (CA4 1997), cert. pending No. 97-5623. Federal courts can issue declaratory judgments in cases within their jurisdiction. 28 U. S. C. § 2201.

Unlike a preliminary injunction, a declaratory judgment gives relief only when it is final. *Doran* v. *Salem Inn, Inc.*, 422 U. S.

922, 931 (1975). In the context of the present case, though, the interim relief of the injunction is illusory. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 214 (1995) (new precedent on statute of limitation resulted in dismissal of pending cases).

The declaratory relief portion of the District Court's decision is not before this Court. The Court of Appeals held it had no jurisdiction over that aspect of the case, because it was not yet final. App. to Pet. for Cert. 8a.[8] Petitioners have not challenged that holding. The only issues, then, are the jurisdiction to issue the injunctions and the propriety of issuing it. The injunction in this case was unprecedented, intrusive, unnecessary, ineffective, and improper. Its issuance was a gross abuse of discretion, calling for an exercise of this Court's supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

November, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

---

8. To expedite resolution of this issue, the District Court could certify it for appeal. 28 U. S. C. § 1292(b).